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No. 91-755

In The

Supreme Court of the United States

October Term, 1991

CORAL CONSTRUCTION COMPANY and OREGON COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

Petitioners,

v.

KING COUNTY, WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

BRIEF FOR RESPONDENT IN OPPOSITION

NORM MALENG
King County Prosecuting Attorney

KEVIN M. RAYMOND
Senior Deputy Prosecuting Attorney
Counsel of Record

QUENTIN R. YERXA
Deputy Prosecuting Attorney

Civil Division
E550 King County Courthouse
Seattle, Washington 98104
(206) 296-9015

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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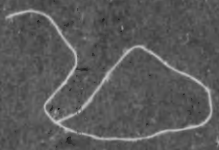

QUESTIONS PRESENTED

1. Whether there are special and important reasons why the petition for a writ of certiorari should be granted in this case, particularly given its unique procedural posture?

2. Whether the Ninth Circuit correctly held that two post-enactment studies should be considered by the district court on remand to determine whether adequate factual justification exists to support adoption of the County's MBE program in 1989?

3. Whether the Ninth Circuit correctly held that petitioner Coral Construction Company must prove on remand that its failure to be awarded a public construction contract was proximately caused by the geographical overbreadth of the County's MBE program to recover damages under 42 U.S.C. § 1983 and 42 U.S.C. § 1981?

PARTIES TO THE PROCEEDING

Petitioner Coral Construction Company is an Oregon corporation. Its parent company is MNC Investment Incorporated, an Oregon corporation. Petitioner Oregon Columbia Chapter of the Associated General Contractors of America, Inc. is an Oregon nonprofit corporation and has no parent company or subsidiaries. Respondent King County, Washington is a political subdivision of the State of Washington. It is a "home rule charter county" created pursuant to Article 11, Section 4 of the Washington Constitution.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 941 F.2d 910 (9th Cir. 1991). (App. 1-59). The opinion of the United States District Court for the Western District of Washington is reported at 729 F. Supp. 734 (W.D. Wash. 1989). (App. 60-77).

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was rendered on August 8, 1991. The petition for writ of

certiorari was filed on November 6, 1991. Petitioners have invoked this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Respondent King County accepts the statement of constitutional provisions, statutes and regulations involved as set forth by petitioners.

STATEMENT OF THE CASE

This case arises out of a claim for damages by petitioner Coral Construction Company ("Coral"), based on the award by respondent King County ("County") of a public construction contract to another firm. The contract at issue was awarded pursuant to the provisions of the County's Minority and Women's Business Enterprise ("MWBE") program. Also at issue are claims by Coral and petitioner Associated General Contractors of America ("AGC") for declaratory and injunctive relief.

In 1981, the County enacted a program to remedy the problem of discrimination against minority-owned businesses (MBEs) and women-owned businesses (WBEs) seeking to contract or subcontract on county business. Following the Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the County amended its program to meet the requirements of that decision. *See* King County, Wash., Ordinance 8937 (May 1, 1989), codified as KING COUNTY CODE CHAPTER 4.18 ("Ordinance").

(App. 78-124). It is the 1989 version of the Ordinance that is primarily at issue in this case.[1]

The Ordinance employs two distinct mechanisms by which county contracts are awarded and the disadvantages experienced by MBEs and WBEs redressed. These mechanisms are referred to as the "percentage preference" and "subcontractor set-aside" methods. In general, the percentage preference method applies to contracts of $10,000 or less. It gives a slight preference to bids from businesses which are MBEs or WBEs, or to bidders who agree to use such businesses as subcontractors. KING COUNTY, WASH., CODE § 4.18.060(A)(1). (App. 102-04). The set-aside method applies to contracts in excess of $10,000, and requires bidders to use MBEs and WBEs for specific amounts of the subcontracting work on the contract. *See id.* at § 4.18.060(A)(2). (App. 105-07).

While the set-aside method would ordinarily have been applied to the award of the contract at issue, § 4.18.060(C) permits the County, prior to bid, to choose one method over the other if it will "be a more feasible method of achieving" the County's overall annual goals for participation by MBEs and WBEs. (App. 108). Pursuant to this authority, the percentage preference method was used to award the contract in this case. *Coral Construction Co. v. King County*, 941 F.2d 910, 914 (9th Cir. 1991). (App. 6).

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[1] As discussed *infra*, the Ordinance was further amended in 1990.

The circumstances giving rise to this controversy began in September 1989, when the County invited bids on a contract to install guardrails along roads at various locations within King County. Bids were opened on September 28, 1989. In terms of absolute dollars, the low bidder was Coral at $178,100. Taking into account the "percentage preference" provisions of the Ordinance, however, the contract was awarded to Dirt & Aggregate Interchange, Inc. (Dirt & Aggregate), an Oregon-based MBE which submitted a bid of $185,153.50. *Id.*

Petitioners filed the present lawsuit in the United States District Court for the Western District of Washington, alleging that the County's MWBE program, on its face and as applied to Coral, violated the Constitution's equal protection clause and two federal civil rights statutes, 42 U.S.C. § 1983 and 42 U.S.C. § 1981. Petitioners sought damages, injunctive and declaratory relief, and attorney's fees. *Id.* at 914-15 (App. 6).

The district court, on cross-motions for summary judgment, upheld the County's MWBE program in its entirety by order dated December 4, 1989. *Coral Construction Co. v. King County*, 729 F. Supp. 734, 740 (W.D. Wash. 1989). (App. 76-77). Petitioners appealed to the Ninth Circuit.

While the case was on appeal, the County's MWBE program was amended again in 1990. *Coral*, 941 F.2d at 915 (App. 7-8). These amendments, enacted on August 29, 1990,

> incorporated two consultant reports into the record underlying the MWBE program. The first

study, prepared by Perkins Coie (and hereinafter referred to as the Perkins Coie Consultant Study), documents through statistics and anecdotal evidence the impact of discrimination in the local construction, architecture, and engineering fields. The second study, conducted by the Washington Consultant Group, focused on discrimination in the local goods and services industries. The two studies cost approximately $411,000 and were paid for by several local agencies. King County contributed $95,000.

The mechanics of the MWBE program were also altered by the August 29, 1990 amendments. The "percentage preference" method for allocating set-asides was modified; rather than using a fixed five-percent preference, a flexible-percentage preference was employed, the percentage ~~to~~ be determined on a case-by-case basis. In addition, under the amended version of the program, *all* prime contractors, even those who are themselves women- or minority-owned, are required to employ minority- and women-owned subcontractors, unless the prime contractor itself will perform twenty-five percent or more of the contract. Finally, the new ordinance requires the County's Office of Civil Rights and Compliance to monitor the effects of the MWBE program to ensure that it does not disproportionately favor a particular racial or ethnic group, and that it does not remain in force longer than is necessary to offset the effects of prior discrimination.

Id. at 915 (App. 7-8).[2]

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[2] The district court did not consider either study. A draft of the Perkins Coie Consultant Study was filed with the district

(Continued on following page)

While the appeal to the Ninth Circuit was pending, the County moved to dismiss petitioners' claims for injunctive and declaratory relief. The County argued these claims had been rendered moot by the 1990 amendment of the Ordinance.[3]

The Ninth Circuit affirmed the constitutionality of the WBE portions of the Ordinance, but reversed and remanded the district court's decision as to the MBE portions. *Id.* at 933 (App. 58-59). The County's motion for partial dismissal of the appeal on mootness grounds was denied.[4] *Id.* at 928 (App. 44).

The court remanded the case to the district court "for determination of whether the consultant studies provide adequate justification to establish a 'compelling government interest' for King County's adopting the MBE program." *Id.* at 922 (App. 26).[5]

(Continued from previous page)

court by King County in conjunction with its briefing on the cross-motions for summary judgment. The district court found it unnecessary to consider the study, however. *Coral*, 729 F. Supp. at 737 n.4 (App. 67). The Washington Consultant Group study was not released until July 1990.

[3] Neither of the lower courts has ever considered the constitutionality of the Ordinance as amended in 1990.

[4] The Ninth Circuit, recognizing the "unique procedural posture" of the case, left "the issue of continued jurisdiction" and "the question of the amended program's constitutionality – and the corresponding question of the continued necessity for injunctive or declaratory relief – to the district court for determination on remand." *Coral*, 941 F.2d at 928, 933 (App. 44-45, 59).

[5] The Ordinance, in its 1989 form, directed the County Executive to commission a report to study discrimination in

(Continued on following page)

The court also concluded that the County's MBE program was not "narrowly tailored" in one respect, finding that its definition of "minority business" could operate to give preferential treatment to MBEs that had never sought to do business in King County. *Id.* at 925-26 (App. 35-37). Because the record did not disclose whether Dirt & Aggregate was entitled to the benefit of the percentage preference in this case, however, the court remanded the question of damages. There, the court held that Coral must demonstrate "a causal link between the purported [constitutional] violation and its injury" to recover damages. *Id.* at 927 (App. 40).

Finally, the court held that petitioners' request for an award of attorney's fees was premature because no judgment in favor of either party had yet been entered. *Id.* at 933 (App. 58).

Petitioners filed a petition for a writ of certiorari to this Court on November 6, 1991.

SUMMARY OF ARGUMENT

There are no special and important reasons why the petition for a writ of certiorari should be granted in this case, particularly given its unique procedural posture.

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King County and recommend any appropriate changes to the MWBE program. (KING COUNTY, WASH., CODE § 4.18.130). (App. 124).

Moreover, the Ninth Circuit correctly ruled that the district court should on remand consider two post-enactment studies to determine whether they provide adequate justification for the County's adoption of its MBE program in 1989. The Ninth Circuit also correctly held that Coral is not entitled to an award of damages unless it can prove on remand that the MBE program's overbroad minority business definition caused it to lose its bid to a business which the County should not have considered.

REASONS THE PETITION SHOULD BE DENIED

1. There are no special and important reasons why the petition for a writ of certiorari should be granted in this case, particularly given its unique procedural posture.

Review on writ of certiorari is a matter of judicial discretion. A petition for a writ of certiorari "will be granted only where there are special and important reasons therefor." SUPREME COURT RULE 10.1. There are no special or important reasons why the petition in this case should be granted, particularly given its unique and incomplete procedural stance.

The petition presents two questions. The first relates to the Ninth Circuit's holding that the district court should now consider two post-enactment studies in determining whether the necessary factual predicate exists to support the MBE program adopted by the County in 1989. The second relates to the Ninth Circuit's holding that Coral must on remand prove causation in order to recover damages.

Although petitioners argue otherwise, the Ninth Circuit's opinion does *not* signal a split in the circuits regarding the relevance of "post-enactment evidence" under this Court's decision in *Croson*. Petitioners assert that the Ninth Circuit's holding on this point is at odds with the Sixth Circuit's holding in *Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989), which involved a challenge to a Michigan MWBE preference law. A close reading of the *Milliken* case, however, reveals that the question of whether post-enactment evidence of discrimination could be considered by the lower court was not addressed. Petitioners point to no other post-*Croson* circuit court opinion that is even arguably in conflict with the Ninth Circuit's opinion in this case.

No contention regarding a split of authority is made with respect to the question of damages. Moreover, and for the reasons set forth in greater detail below, the Ninth Circuit's decision in no manner "departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." SUPREME COURT RULE 10.1.

This case is also in a unique procedural posture. No final judgment in favor of either party has yet been entered. The district court has yet to consider certain evidence that was before it prior to its ruling on cross-motions for summary judgment. The district court might, or might not, find that this evidence sufficiently supported the County's adoption of its MBE program in 1989. The record at the district court level is also incomplete on the issue of whether the operation of the MBE program's minority business definition, which the Ninth

Circuit ruled was overbroad, caused Coral's bid to be rejected in favor of another firm.

For these reasons, denial of the petition would comport with the principle articulated in *Ashwander v. Tennessee Valley Authority*, 797 U.S. 288 (1936), under which the Court has generally refrained from passing on constitutional questions where the posture of the case makes it unnecessary to do so. Allowing this case to proceed to final judgment below may well lead to a result that makes it unnecessary to decide the issues raised in the petition. If significant constitutional issues do remain after final judgment, both sides will have the opportunity to bring those issues before this Court at that time. *See Urie v. Thompson*, 337 U.S. 163 (1949) (denial of certiorari at interlocutory stage is without prejudice as to the questions presented).

Moreover, it is possible that the district court will conclude that petitioners' claims for declaratory and injunctive relief are now moot. In that regard it should be emphasized that the *current* version of the County's MBE program is not before the Court on this petition for review. Only issues regarding the constitutionality of the *prior* version of the Ordinance, a version which is no longer even in effect, could be affected by review by the Court.

These facts also weigh heavily against acceptance of the petition. As the Court noted in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916):

> [certiorari jurisdiction] is to be exercised sparingly, and only in cases of peculiar gravity and

> general importance, or in order to secure uniformity of decision. [Citations omitted.] And, except in extraordinary cases, the writ is not issued until the final decree.

Id. at 240 U.S. at 258.

For all of these reasons, the issues presented by the petition are not of such "immediate and special importance" as to warrant plenary review by this Court.

2. The Ninth Circuit correctly ruled that two post-enactment studies should be considered by the district court on remand to determine whether they provide the factual predicate necessary to support the County's adoption of its MBE program in 1989.

The Ninth Circuit held that the district court erred in granting summary judgment to King County, in large part because it concluded that the testimonial evidence of prior discrimination which was part of the legislative record considered by the district court was insufficient, standing alone, to establish a compelling governmental interest for the County's MBE program under *Croson*. *Coral*, 941 F.2d at 919-22 (App. 20-26). The court stated:

> Undoubtedly, the written testimony of the numerous affiants suggests that there *may* be a systemic discrimination within the King County construction industry. Without a statistical foundation, the picture is incomplete. Strict scrutiny demands a fuller story. Not enough has been told so far to meet King County's burden that its program passes the "compelling governmental interest" requirement.

Id. at 919 (App. 20).

In its remand order, the Ninth Circuit directed the district court to consider two studies completed after the Ordinance was amended in 1989. *Id.* at 933 (App. 58). These two studies, containing statistical evidence documenting discrimination in King County, are referred to as the "Perkins Coie Consultant Study" and the "Washington Consultant Group Study." A draft of the Perkins Coie study was before the district court prior to its summary judgment decision. The district court expressly declined to consider the draft study, however, ruling that the testimonial evidence was sufficient to support the County's program. *Coral*, 729 F. Supp. at 737 n. 4 (App. 67).

The studies were commissioned by the County and other local governments in King County. *Coral*, 941 F.2d at 915 (App. 7-8). Significantly, the 1989 version of the Ordinance expressly authorized and directed the preparation of these studies. KING COUNTY, WASH., CODE § 4.18.130. (App. 124). Both studies have now been incorporated into the Ordinance through an amendment passed in 1990. *Coral*, 941 F.2d at 915 (App. 7).

Petitioners argue that the Ninth Circuit erred, contending that this Court's decision in *Croson* requires the constitutionality of the Ordinance to be determined solely on the basis of the evidence before the County Council at the time of enactment. Petitioners' argument, however, calls for an unduly restrictive interpretation of *Croson*, and should be rejected.

In *Croson* this Court stated:

> Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.

> If the city of Richmond had evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion.

488 U.S. at 509. In discussing the City of Richmond, the Court also stated:

> if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.

Id. at 492.

Nothing in *Croson* prohibits consideration of post-enactment evidence in a case such as this one. Indeed, the plurality in *Croson* cites with approval the Sixth Circuit Court of Appeal's holding in *Ohio Contractors Association v. Keip*, 713 F.2d 167 (6th Cir. 1983), which involved a challenge to a state minority business preference statute. *Croson*, 488 U.S. at 477. It is clear that both the district court and the Sixth Circuit in *Keip* considered evidence that was *outside* of the legislative record in passing upon the constitutionality of the program at issue there. *See Keip*, 713 F.2d at 173.

The Ninth Circuit's ruling strikes an appropriate balance between the "conflicting demands sometimes placed upon a state or municipality by the Constitution." *Coral*,

941 F.2d at 920 (App. 23). As the court noted, a local government may well have a constitutional duty to take expeditious steps to redress racial discrimination within its jurisdiction once it has been identified. *Id.* At the same time, any governmental response that utilizes racial classifications must ultimately withstand the heightened scrutiny requirements set forth in *Croson*. As the Ninth Circuit noted,

> a municipality having such evidence [of discrimination] would face the dilemma of deciding whether to wait the months necessary for further development of the record, risking constitutional culpability due to its inaction, or to act and to risk liability for acting prematurely but otherwise justifiably.

Coral, 914 F.2d at 921 (App. 24).

The Ninth Circuit's approach resolves this dilemma. It permits local governments to adopt narrowly tailored remedial programs when faced with significant evidence of racial discrimination within their jurisdictions. The reasonableness of the approach adopted by the Ninth Circuit is made clear by an examination of the factual circumstances at issue here, which are very different from those presented to the Court in *Croson*.

In *Croson*, the Court found that the quantity of evidence before the Richmond City Council did not even "[approach] a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry." 488 U.S. at 500. In this case, by contrast, there was a "strong basis in evidence" of discrimination before the County Council in 1989. For example, "[s]everal dozen people gave written or oral descriptions of such

discrimination" to the County Council. *Coral*, 729 F. Supp. at 737 (App. 66-67). Moreover, nearly all of the "detailed and specific" evidence presented related directly "to the construction industry within the county's jurisdiction". *Id.* Nothing similar was presented in *Croson*.

It would have been wrong, and perhaps unlawful, for the County Council to have failed to act under these circumstances. The nature of the County's response, moreover, was completely reasonable. In amending the Ordinance in 1989, the County Council recognized that further study of the issue of discrimination in the King County construction industry was warranted. *See* KING COUNTY, WASH., CODE § 4.18.005(F). (App. 79-80). The County Council directed the executive to commission the studies necessary to do that, and to make recommendations for additional tailoring of the MBE program if necessary. *See id.* at § 4.18.130 (App. 124).

Those studies have now been completed. They confirm the testimonial evidence of discrimination presented to the County Council in 1989. Further refinements suggested by the studies, as well as the studies themselves, were incorporated into the Ordinance by amendment in 1990.

In short, the County has done everything it possibly could to redress, in a manner consistent with *Croson*, the effects of widespread discrimination in King County. The approach adopted by the Ninth Circuit takes account of the prior decisions of this Court while giving the County the opportunity to redress the effects of demonstrated discrimination in a reasonable and measured way.

In holding that the studies should be considered by the district court, the Ninth Circuit correctly analogized to this Court's analysis in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n. 21 (1977) and in *Mount Healthy City School Dist. v. Doyle*, 429 U.S. 274, 285-87 (1977). As the Ninth Circuit noted, in both of those cases this Court held that once it is shown that a governmental action has been taken for a constitutionally impermissible reason, the burden shifts to the governmental actor to show that it would have taken the same action in the absence of the improper reason. Here, the Ninth Circuit's ruling essentially shifts the burden of proof in the same way: it requires the County to prove that sufficient competent and relevant statistical evidence supports its "good faith reason to believe that systemic discrimination has occurred, and is continuing to occur," in the King County construction industry. *Coral*, 941 F.2d at 921 (App. 25). As the court noted, the County bore the risk at the time of enactment "that a fuller development of the facts [would] not support the need for the program, or that the program might not be narrowly tailored." *Id.*, at 921 n. 11 (App. 25).

The Ninth Circuit's ruling also comports with the views of an eminent group of constitutional scholars, who have urged that:

> [local governments] should be allowed sufficient time to engage in good faith efforts to reevaluate their programs in light of [*Richmond v. Croson*]. If their programs are challenged during the period of reevaluation, courts should follow the practical and sensible rule, adopted in analogous constitutional contexts, that would permit local governments adequate time to

> establish the relevant factual record needed to respond to such a challenge.

Joint Statement, *Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 Yale Law Journal 1711 at 1714 (1989). This same group of scholars noted that this Court:

> has not held that minority set-aside programs initiated before the *Croson* decision must be dismantled simply because the facts justifying such programs had not been fully developed at the time those programs were in place.

Id. at 1713.

For all of these reasons, the Ninth Circuit's ruling that the post-enactment studies should be considered on remand does not warrant review by this Court on a writ of certiorari, and the petition should be denied.

3. The Ninth Circuit correctly held that Coral is not entitled to an award of damages unless it can prove on remand that its failure to be awarded the guardrail contract was proximately caused by the geographical overbreadth of the Ordinance.

In determining whether the County's MBE program was "narrowly tailored," the Ninth Circuit held that the Ordinance must "be limited in scope to the boundaries" of King County. *Coral*, 941 F.2d at 925 (App. 35-36). After finding that the Ordinance's definition of "minority business" could give preferential treatment to minority-owned businesses that had never attempted to do business in King County, the court concluded the definition was geographically overbroad. *Id.*, at 925-26 (App. 35-37).

However, because the record did "not indicate whether Coral Construction lost its bid to a business which King County should not have considered," the Ninth Circuit remanded the issue of damages to the district court. *Id.* at 926 (App. 39). There, the court held, Coral must prove "a causal link between the purported violation and its injury" in order to recover damages under either 42 U.S.C. § 1983 or 42 U.S.C. § 1981. *Id.* at 927 (App. 40).

Petitioners contend the Ninth Circuit's geographical overbreadth determination *automatically* entitles them to an award of damages and attorney's fees. Petitioners, while taking issue with the court's remand of this issue, nevertheless failed to address the issue head-on in their petition. Instead, they argue around it, claiming that the effect of the court's holding is to somehow "reconfigure" the reach of the Ordinance's minority business definition.[6]

Petitioners completely mischaracterize the Ninth Circuit's holding on the question of damages. The court did not "reconfigure" the minority business definition – it declared it to be unconstitutionally overbroad. What the court *did* do is follow the prior decisions of this Court

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[6] This purported "reconfiguring" by the Ninth Circuit is variously described by petitioners as a "disregard [of] the County Council's drafting of the Ordinance"; an effort to "rewrite" the Ordinance in "much narrower terms"; an effort to "usurp" the policymaking and legislative functions of the County Council; an act of judicial "sleight of hand"; "overreaching"; and a violation of "the venerated principle of federalism." (Pet. 19-23).

uniformly holding that even the deprivation of a constitutional right does not automatically entitle a party to an award of compensatory damages. To recover such damages, a party must prove they were *caused* by the deprivation of the right. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307-08 (1986); *Carey v. Piphus*, 435 U.S. 247 (1978).

Petitioners seek damages under two federal civil rights statutes, 42 U.S.C. §§ 1983 and 1981. Both statutes grant what are essentially tort remedies to individuals who can prove they were injured in a compensable way by a deprivation of their constitutional rights. Causation is an essential element of proof under both statutes.

In *Carey*, the Court affirmed that § 1983 creates "a species of tort liability" in favor of persons who have been deprived of their constitutional rights. 435 U.S. at 253, citing *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Constitutional rights, however,

> do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.
>
> Our legal system's concept of damages reflects this view of legal rights. "The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty." 2 F. Harper & F. James, Law of Torts § 25.1, p. 1299 (1956) (emphasis in original). [Footnote omitted.] The Court implicitly has recognized the applicability of this principle to actions under § 1983 by stating that damages are available under that section for actions "found . . . to be

> violative of . . . constitutional rights *and found to have caused compensable injury. . . . "* [Citations omitted].

Carey, 435 U.S. at 254-55. (Emphasis in original.) As a result, the "basic purpose" of § 1983 damages is "to compensate persons for injuries caused by the deprivation of constitutional rights". *Id.*, at 254.

The Court was even more emphatic in *Stachura*. There, the Court held that "when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." 477 U.S. at 306. In striking down instructions that could have permitted a jury to award damages based solely on the monetary value it placed on certain constitutional rights, the Court declared:

> We therefore hold that damages based on the abstract "value" or "importance" of constitutional rights are not a permissible element of compensatory damages in [§ 1983] cases.

Id. at 310.

Like § 1983, § 1981 is in the nature of a tort remedy. *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 518 (3rd Cir. 1986), *aff'd on other grounds*, 481 U.S. 604 (1987). This fact was implicitly recognized by the Court in *Runyon v. McCrary*, 427 U.S. 160, 179-82 (1976), where the use of a state's personal injury statute of limitations was found appropriate in a § 1981 case. As with its § 1983 claim, Coral must prove "a causal link between the purported [constitutional] violation and its injury to recover damages under § 1981." *Coral*, 941 F.2d at 927 (App. 40).

As the Ninth Circuit recognized, an award of damages cannot be based solely on a conclusion that the Ordinance's minority business definition is overbroad. In remanding the question of damages to the district court, the court was not engaging in "sleight of hand", rewriting the Ordinance or ignoring the legislative intent of the County Council. In fact, it was faithfully adhering to the prior decisions of this Court, by recognizing that the question of whether the MBE program's overbroad minority business definition was "the cause of Coral Construction's harm" can be resolved only on remand. *Id.*

For these reasons, the Ninth Circuit's ruling remanding the issue of causation to the district court does not warrant review on a writ of certiorari, and the petition should be denied.

CONCLUSION

The Ninth Circuit correctly ruled that the district court should now consider the two post-enactment studies to determine whether the necessary factual predicate exists to support adoption of the County's MBE program as it existed in 1989. The court's opinion takes into account the abundant testimonial evidence that *was* before the County Council at the time the program was enacted. The decision also recognizes the obligation local government has to act expeditiously to redress local discrimination it has helped to perpetuate, even when it has done so passively.

The court also correctly held that causation is an essential element of Coral's claims for damages under

both 42 U.S.C. § 1983 and 42 U.S.C. § 1981. The court's conclusion that the MBE program's minority business definition is geographically overbroad does not automatically entitle Coral to an award of damages. Coral must first prove that the operation of that provision caused it to lose its bid to a business the County should not have considered.

There are no special and important reasons why the petition for a writ of certiorari should be granted in this case. For all of these reasons, it should therefore be denied.

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Respectfully submitted,

NORM MALENG
King County Prosecuting Attorney

KEVIN M. RAYMOND
Senior Deputy Prosecuting Attorney
Counsel of Record

QUENTIN R. YERXA
Deputy Prosecuting Attorney

Attorneys for Respondent King County, Washington